STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2014
v	No. 313887 Wayne Circuit Court
RAHMAN BANKS, Defendant-Appellant.	LC No. 12-005675-FC

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of assault with intent to commit murder (AWIM), MCL 750.83, intimidating a witness, MCL 750.122(3)(a), retaliating against a witness, MCL 750.122(8), common-law obstruction of justice, MCL 750.505, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 20 to 30 years for the AWIM conviction, 25 to 264 months for the intimidating-a-witness conviction, 67 to 180 months for the retaliating-against-a-witness conviction, 47 to 90 months for the obstruction-of-justice conviction, and 47 to 90 months for the felon-in-possession conviction. He was also sentenced to a consecutive term of five years in prison for the felony-firearm conviction. We affirm in part, vacate in part, and remand for amendment of the judgment of sentence consistent with this opinion.

Defendant first argues that the transfer of his case from Judge Bill to Judge Boykin was improper. Specifically, defendant argues that the prosecution failed to make a written motion setting forth the grounds and authority for the desired transfer. Further, defendant argues that the prosecution's efforts to have the case transferred demonstrate an act of impermissible forum shopping, and an attempt to manipulate the blind-draw system for assigning judges. Additionally, defendant argues that his ability to appeal the decision below has been compromised because there is no written record of the prosecution's motion to transfer the case. Finally, defendant argues that the order to transfer the case was erroneous because his case bears no relevance to the criminal case of his brother, Nasir Banks. We agree, but conclude that defendant was not prejudiced by the transfer.

"The interpretation of court rules is a question of law that this Court reviews de novo." *People v Walters*, 266 Mich App 341, 346; 700 NW2d 424 (2005). However, because the chief judge may transfer cases "for good cause" pursuant to MCR 8.111(C), "the abuse of discretion standard also applies." *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 258; 739 NW2d 121 (2007). Accordingly, we review de novo whether the lower court properly complied with the court rule, but the decision to reassign the case is reviewed for an abuse of discretion. *Id.*

MCR 8.111 governs the assignment of cases to judges in Michigan courts. Pursuant to MCR 8.111(B), "all cases must be assigned by lot, unless a different system has been adopted by local court administrative order." The Third Judicial Circuit has enacted Rule 6.100(C), which states that "cases shall be assigned by lot to a trial judge. If the trial judge is unavailable on the date set for trial, the case shall be reassigned to an available judge within the Criminal Division." MCR 8.111(C) provides for the reassignment of cases, and states, "if a judge is disqualified or for other good cause cannot undertake an assigned case, the chief judge may reassign it to another judge by a written order stating the reason. To the extent feasible, the alternate judge should be selected by lot." Further, MCR 8.111(D)(1) provides that "if one of two or more actions arising out of the same transaction or occurrence has been assigned to a judge, the other action or actions must be assigned to that judge."

Generally, only a judge assigned in accordance with the court rules can enter dispositive orders in a case. See *Schell v Baker Furniture Co*, 461 Mich 502, 515 n 13; 607 NW2d 358 (2000). Additionally, when reassigning a case between judges, a chief judge must enter a written order, including the reason for the reassignment. MCR 8.111(C). In criminal cases, "'the general rule is that it is error requiring reversal to substitute a judge to preside over the remainder of a trial in which evidence was adduced while the original judge was presiding.'" *People v McCline*, 442 Mich 127, 131; 499 NW2d 341 (1993) (citation omitted). While it is preferred that "a single judge preside over all aspects of a trial," if the case is transferred prior to opening argument or the introduction of any testimony, a defendant must establish prejudice by the substitution of one judge for another. *Id.* at 132, 134.

Though Judge Hathaway abused his discretion by transferring the case, defendant has failed to demonstrate prejudice arising from the transfer. As required under MCR 8.111(C), Judge Hathaway entered a written order stating the reason for the transfer: Judge Boykin was presiding over a related case. Because the record does not suggest that Judge Bill was disqualified or otherwise prevented from presiding over this case, Judge Hathaway's order presumably arises from MCR 8.111(D)(1), which allows reassignment of a case if it arises out of the same transaction or occurrence as another case. However, this Court has stated that "actions arise from the same transaction or occurrence only if each arises from the identical events leading to the other action." *National Waterworks, Inc*, 275 Mich App at 261. An example of actions arising out of the same transaction or occurrence would be "simultaneous suits brought by passengers of a derailed train." *Id.* Here, the lower court's observation that defendant's case was related to Nasir's was factually correct, but it was the incorrect standard for reassigning the case. Nasir shot Steve Jones on November 30, 2011; defendant shot Jones on April 19, 2012. Though the cases are related in that defendant apparently shot Jones because of his testimony in Nasir's trial, the actions did not arise from identical events. Accordingly, the court abused its discretion when it reassigned the case for this reason.

Because the case was transferred on the day of arraignment, prior to trial, defendant is required to demonstrate prejudice arising out of the transfer. *McCline*, 442 Mich at 132. Defendant does not provide any arguments on appeal for how the transfer to Judge Boykin prejudiced him. Judge Boykin's knowledge of Nasir's case did not constitute prejudice. Other than Jones's initial testimony standing as a possible motive for defendant's crime, there were no overlapping issues between the cases; defendant's main argument at trial was that he had been misidentified. Therefore, though the court abused its discretion by transferring the case, defendant has not demonstrated the necessary prejudice required for reversal.

Defendant also argues that the transfer was invalid because it was the result of a motion that did not comply with MCR 2.119(A). According to MCR 2.119(A), motions made by counsel must be in writing and state with particularity the grounds and authority for the relief sought. However, MCR 8.111 does not limit transfer of a case to those situations where one party moves for a transfer; the court may transfer the case on its own accord. Further, there is no indication in the record that the prosecution actually made a motion to transfer the case. While the parties apparently discussed the subject of transfer with Judge Hathaway, the record does not contain any transcript of those discussions, nor their date or context. Apparently, defendant's counsel checked with the court reporter for Judge Hathaway, and no recordings or transcripts of any proceedings were made on June 18, 2012, the date of the transfer. Because there is no evidence that the prosecution actually made a motion to transfer the case, defendant's argument regarding MCR 2.119(A) is meritless.

Finally, defendant argues that the lack of a written record of proceedings before Judge Hathaway regarding the transfer of the case violates his due-process right to a full record of the lower court proceedings. MCR 8.108(B) states that a verbatim record must be maintained of voir dire of prospective jurors, the testimony, the charge to the jury, the opening statements and final arguments in a jury trial, the reasons given by the court for granting or refusing any motion made by a party during the course of a trial, and opinions and orders dictated by the court. MCR 8.108(E) requires that the records should be furnished to any party that requests them. A defendant must be supplied with a "record of sufficient completeness" for adequate consideration of the defendant's claims on appeal. *People v Howard*, 226 Mich App 528, 555; 575 NW2d 16 (1997). It is undisputed that defendant received a record of the entire trial. While there is no transcript of the discussions between counsel and Judge Hathaway regarding the transfer of the case to Judge Boykin, there is no record that the prosecution ever made a motion to transfer the case. And as noted, defendant has not demonstrated that the transfer prejudiced him. We perceive no error.

Defendant next argues that the trial court erred when it prohibited his father, Lamont Williams, from testifying that defendant's brother, Yusuf Banks, said defendant was not involved in Jones's shooting. Specifically, defendant argues that his constitutional right to present a defense was violated because Yusuf's allegedly self-implicating statement should have been allowed into evidence pursuant to MRE 804(b). Further, defendant argues that trial courts are prohibited from using state hearsay rules to exclude evidence showing someone else committed a crime. We disagree.

We review for an abuse of discretion the trial court's evidentiary rulings. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs when the trial

court chooses an outcome that falls outside the permissible range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, we review for plain error defendant's unpreserved constitutional argument. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Generally, hearsay evidence is not admissible at trial. MRE 802. Hearsay is defined as a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). However, hearsay may be admissible if it falls within a specified exception to the hearsay rule. MRE 802. MRE 804 is the hearsay exception governing situations in which the declarant is unavailable to testify at trial. MRE 804(b)(3) excludes from the hearsay rule statements made against the declarant's own interest. Specifically, MRE 804(b)(3) states that if the declarant is unavailable as a witness, a statement may be admitted if "at the time of its making . . . [it] so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made . . . unless believing it to be true." See also *People v Taylor*, 482 Mich 368, 379-380; 759 NW2d 361 (2008). This type of statement against interest may be used as substantive evidence at trial. *People v Bennett*, 290 Mich App 465, 483; 802 NW2d 627 (2010). The rule also states that a statement exposing the declarant to criminal liability and offered to exculpate a defendant is inadmissible unless corroborating evidence clearly indicates the trustworthiness of the statement. MRE 804(b)(3).

Because the lower court admitted hearsay testimony regarding Yusuf's alleged confession to shooting Jones, defendant's argument is meritless. Defendant's argument is that despite the court's ruling allowing Williams to testify that Yusuf confessed to the crime, the court still erred because it prohibited Williams from testifying to Yusuf's statements that defendant had not been involved in the crime. However, by the plain language of MRE 804(b)(3), Yusuf's statements regarding defendant not being involved in the shooting were not a statement against his own interest; rather, they were hearsay not falling into any exception. The court properly allowed Williams to testify regarding Yusuf's statements incriminating himself, but the separate statements by Yusuf concerning defendant's nonparticipation in the crime would not have exposed Yusuf to criminal liability. The trial court properly precluded Williams from testifying that Yusuf had said defendant was not involved in the shooting.

Defendant also argues that he had a due-process right to introduce evidence that the crimes allegedly committed by him were committed by another person. Specifically, defendant cites *Chambers v Mississippi*, 410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973), for the proposition that state rules of evidence may not be employed by state courts to prevent a defendant from showing evidence that another person committed a crime, specifically in the context of a hearsay statement against interest. Again, defendant's argument is misguided. Yusuf's statements against interest were, in fact, allowed into evidence by the lower court. The only statement that the court prohibited was Yusuf's hearsay statement that defendant had not been involved in shooting Jones. As noted, Yusuf's statements regarding defendant not being involved were hearsay because they were out of court statements offered to prove the truth of the matter asserted: namely, that defendant did not shoot Jones. Because those statements did not involve a statement against Yusuf's interest and did not fall under any other exception to the hearsay rule, they were inadmissible.

Defendant next argues that his convictions of intimidating a witness, retaliating against a witness, and obstruction of justice violate the Double Jeopardy Clause. Specifically, defendant argues that intimidating a witness and obstruction of justice involve the same conduct as retaliating against a witness, and that it is impossible to be guilty of retaliating against a witness without also intimidating a witness and obstructing justice. In the context of defendant's convictions of intimidating a witness and obstruction of justice, we agree.

"A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo." *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). The United States and Michigan constitutions protect a defendant from being placed twice in jeopardy, "or subject to multiple punishments, for the same offense." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008); see also US Const, Am V; Const 1963, art 1, § 15. The validity of multiple punishments under the Michigan Constitution is analyzed under the "same elements standard," which arose from *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). *McGee*, 280 Mich App at 682-683. If the Legislature intended to impose multiple punishments, multiple sentences are permissible regardless of whether the charged offenses have the same elements. *Id.* at 683. However, if the Legislature has not clearly expressed its intent, multiple punishments may be imposed for multiple offenses only when one offense has an element that the other does not. *Id.* If each offense "requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Id.*

Michigan courts have not yet considered whether convictions of retaliating against a witness, intimidating a witness, and obstruction of justice, arising out of the same conduct, violate the prohibition against double jeopardy. "A person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony . . . ." MCL 750.122(8); see also *People v Greene*, 255 Mich App 426, 437; 661 NW2d 616 (2003). "Retaliate" means to "[c]ommit or attempt to commit a crime against any person," MCL 750.122(8)(a), or to "[t]hreaten to kill or injure any person or threaten to cause property damage," MCL 750.122(8)(b). In contrast, a person shall not "[d]iscourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding" by threat or intimidation. MCL 750.122(3)(a).

Additionally, MCL 750.505 is the statutory provision that includes obstruction of justice; it states that "any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony." Obstruction of justice is a common law offense, "defined as 'an interference with the orderly administration of justice.'" *People v Jenkins*, 244 Mich App 1, 15; 624 NW2d 457 (2000) (citation omitted). Rather than a specific offense, obstruction of justice is a category of crimes that interfere with the public administration of justice. *Id.* Accordingly, to sustain a charge of common-law obstruction of justice, common law precedence must exist for the specific offense charged. *Id.* Though the list is not comprehensive, Michigan Courts recognize the 22 specific offenses listed by Blackstone as sufficient to support a charge of obstruction of justice. *People v Thomas*, 438 Mich 448, 457-458; 475 NW2d 288 (1991). The offense of threatening or retaliating against a witness does not appear on Blackstone's list. See *id*. at 457 n 5. However, Michigan courts have recognized the coercion of witnesses to constitute obstruction of justice.

People v Ormbsy, 310 Mich 291, 300; 17 NW2d 187 (1945); *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996). Specifically, this Court has held that an "attempt through threats and coercion to dissuade a witness from testifying" constitutes common-law obstruction of justice. *Id.* at 320.

Applying the *Blockburger* test, defendant's convictions of retaliating against a witness and intimidating a witness do not violate the Double Jeopardy Clause. Each offense contains an element not contained in the other. The offense of retaliating against a witness requires that the defendant commit or threaten to commit a crime against a person after he or she has been a witness in an official proceeding. MCL 750.122(8). Accordingly, a prerequisite for a conviction of retaliating against a witness is that the witness has already testified in some official proceeding. The statute, MCL 750.122(8), seeks to punish an offender for retaliating against a witness in a past proceeding. In contrast, the offense of intimidating a witness involves a defendant discouraging or attempting to discourage a witness from testifying in a present or future proceeding. MCL 750.122(3)(a). Accordingly, the offense of intimidating a witness requires that the defendant prevent a witness from participating in a legal proceeding; it is intended to punish an offender for conduct involving a present or future proceeding. Defendant presumably shot Jones both in retaliation for his testimony in Nasir's preliminary examination, and also to prevent his upcoming testimony in Nasir's pending criminal trial. Though the convictions arose out of a single act, each offense included an element not part of the other. Defendant's convictions of retaliating against a witness and intimidating a witness do not violate the Double Jeopardy Clause.

Further, defendant's convictions of retaliating against a witness and obstruction of justice do not violate the Double Jeopardy Clause. As noted, obstruction of justice in the context of tampering with a witness involves an "attempt through threats and coercion to dissuade a witness from testifying." *Tower*, 215 Mich App at 320. Similar to the statutory offense of intimidating a witness, obstruction of justice is intended to punish an offender for attempting to prevent a witness from participating in a present or future proceeding. *Id.* Conversely, retaliating against a witness requires a crime against a person after he or she has testified in a legal proceeding. MCL 750.122(8). Because these offenses each involve an element not included in the other, convictions of the two offenses arising out of a single act do not violate the Double Jeopardy Clause.

Defendant's convictions of intimidating a witness and obstruction of justice do, however, violate the Double Jeopardy Clause. Neither offense contains a unique element not included in the other. Intimidating a witness requires a defendant to discourage or attempt to discourage a witness from attending or participating in a legal proceeding. MCL 750.122(3)(a). Similarly, common-law obstruction of justice, in the context of tampering with a witness, involves a defendant's attempt, through threats and coercion, to dissuade a witness from testifying. *Tower*, 215 Mich App at 320. These offenses are substantially the same, and neither contains a unique element. In fact, this Court has explained that intimidating a witness "'is an indictable offense at common law, associated with the concept of obstructing justice.'" *People v Milstead*, 250 Mich App 391, 405-406; 648 NW2d 648 (2002), quoting *People v Vallance*, 216 Mich App 415, 419; 548 NW2d 718 (1996). Though obstruction of justice encompasses more than merely intimidating a witness, intimidating a witness necessarily constitutes obstruction of justice. *Id.*

Because defendant was convicted of both offenses, arising out of the same conduct, there was a violation of the Double Jeopardy Clause.

Generally, when a defendant is convicted of multiple offenses in violation of the Double Jeopardy Clause, the remedy is to "affirm the conviction of the higher charge and to vacate the lower conviction." *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). Though defendant's conviction of intimidating a witness carries a lower minimum sentence (25 months as compared to 47 months for defendant's obstruction-of-justice conviction), the offense of intimidating a witness carries a higher maximum sentence. Moreover, whereas intimidating a witness is a Class C offense, MCL 777.16f, obstruction of justice under MCL 750.505 is a Class E offense, MCL 777.16x. Accordingly, obstruction of justice is the lesser offense between the two. Defendant's conviction of intimidating a witness under MCL 750.122(3)(a) is affirmed. But defendant's conviction of obstruction of justice under MCL 750.505, as well as his corresponding sentence, is vacated.

Defendant next argues that defense counsel rendered ineffective assistance at trial. Specifically, defendant argues that the record is not clear regarding what actions counsel took in response to the transfer of the case to Judge Boykin. Defendant argues that this Court should order an evidentiary hearing to determine if counsel provided effective assistance at that stage of the proceedings. Further, defendant argues that counsel improperly failed to object on double jeopardy grounds to his multiple convictions of retaliating against a witness, intimidating a witness, and obstruction of justice. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The lower court's findings of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.*

Criminal defendants have a right under the United States and Michigan Constitutions to the effective assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish ineffective assistance of counsel, a criminal defendant must show that (1) under prevailing professional norms, counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Michigan courts employ a presumption that counsel's performance is effective, and there is a heavy burden upon the defendant to prove otherwise. *Vaughn*, 491 Mich at 670. There is a strong presumption that counsel's assistance constitutes sound trial strategy. *People v Armstrong*, 490 Mich 281, 291; 806 NW2d 676 (2011). This Court will not substitute its judgment for that of defense counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of defense counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Counsel's decision not to raise objections at trial may be sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

Defendant's argument that counsel was ineffective is meritless. Defendant's initial contention, that defense counsel *may* have been ineffective when the case was transferred, is facially incorrect. There are no transcripts regarding the circumstances of Judge Hathaway's

transfer of the case to Judge Boykin, but the arraignment transcript indicates that defense counsel did object to the transfer. Moreover, defendant does not provide any argument regarding how the transfer to Judge Boykin was prejudicial. It is most likely than counsel decided her resources and energy would be better spent on other aspects of the trial. Considering the strong presumption that counsel's actions constituted sound trial strategy, we cannot conclude that counsel performed deficiently by failing to challenge or raise additional objections to the transfer.

Defendant's second contention, that counsel should have objected to his multiple convictions on double jeopardy grounds, is also meritless. Defendant's argument on this point is cursory. Interestingly, neither party made arguments regarding the charges of retaliating against a witness, intimidating a witness, and obstruction of justice at trial. The trial court recognized this fact before issuing its verdict. However, the court issued convictions on those charges based on its overall findings of fact. Though defense counsel chose not to object to these charges on double jeopardy grounds, it is likely that counsel decided to focus her resources and energy on the AWIM charge, which was far more serious and carried a much longer sentence. Additionally, defense counsel pursued a defense strategy in the case involving misidentification; counsel argued that the offenses alleged by the prosecution were actually committed by Yusuf. If the court had been persuaded by counsel's arguments, defendant would likely have been found not guilty of all the charged offenses. Defendant has failed to demonstrate that counsel's actions fell below an objective standard of reasonableness.

Nor was defendant prejudiced. Even if counsel had strenuously objected to the transfer of the case to Judge Boykin, there was overwhelming evidence of defendant's guilt beyond a reasonable doubt. Jones testified that he clearly saw defendant point a gun at him and fire several times at short range. The officer in charge of Nasir's case testified that defendant had attended Nasir's court hearings with Williams. Defendant, not Yusuf, visited Nasir in jail just three days before the shooting of Jones. The only evidence in support of defendant's potential misidentification was from Williams, defendant's father, and defendant himself. Because there was compelling evidence of defendant's guilt, defendant was not prejudiced by counsel's alleged errors.

With respect to defendant's contention that counsel was ineffective for failing to object on double jeopardy grounds, we acknowledge that defendant's conviction of obstruction of justice was improper. However, this Court's vacation of that conviction and corresponding sentence cures any prejudice suffered by defendant. With his obstruction-of-justice conviction and sentence vacated, defendant is not entitled to further relief.

We vacate defendant's conviction of common-law obstruction of justice under MCL 750.505 and his corresponding sentence. The trial court shall prepare an amended judgment of sentence accordingly and transmit a copy thereof to the department of corrections. In all other respects, defendant's convictions and sentences are affirmed.

Affirmed in part, vacated in part, and remanded for amendment of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro